SRI KAJANG ROCK PRODUCTS SDN. BHD.

v.

MAYBAN FINANCE BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[ORIGINATING SUMMONS NO. D3-31-35-87]
13 MARCH 1991

CONTRACT: *Lease agreement - Whether void - Whether loan granted for illegal purpose - Condition precedent - Oral agreement - Evidence Act 1950, ss. 91, 92.*

TRADE AND INDUSTRY*: Permit to extract and remove rock material - Mining Enactment, Cap. 147.*

MONEYLENDERS: *Whether moneylending transaction - Nature of whole transaction - Has to be examined - Intent of transaction - Various methods of raising funds - Hire Purchase Act - Moneylenders Ordinance- Finance Companies Act 1969, ss. 2, 4.*

The plaintiffs are seeking a declaration that the lease agreement entered into by them with the defendants is null and void and that the debenture, land charge and guarantee executed are also void and unenforceable. In support, the plaintiffs contend that the lease agreement was a sham as in reality, the transaction between the plaintiffs and the first defendant was a loan transaction; further, even if it is a lease, it is illegal since it contravenes s. 4 of the Finance Companies Act 1969. The plaintiffs also contend that the loan was granted for an illegal purpose as the land on which the quarry machinery was installed is agricultural land and that the plant and equipment had become fixtures on the land.

Held:

[1] The plaintiffs had sought to raise cash from the first defendant to complete the purchase of the equipment and what the first defendant agreed to do was, in effect, to provide the cash by means of a "leasing facility".

[2] It would be wrong to look at individual aspects of the transaction, for example, at the first defendant entering into the novation agreement or at the agreement to buy the weighbridge, and to hold that the first defendant was in the business of buying quarry equipment or buying weighbridges. Looking at the transaction as a whole, including the related debentures, charges and guarantees, the said related securities were in furtherance of accommodating the plaintiffs' need to raise funds.

[3] In the instant case there has been no suggestion made and there is in any event nothing to show that the intent of disguising the loan transaction as a leasing facility was to avoid the provisions of some law or some aspect of public policy. The obvious reason for the first defendant requiring the plaintiffs to enter into an equipment leasing agreement was to have some security in respect of the money provided by them over and above the charges and guarantee that they required the plaintiffs to provide.

[4] In the face of the agreements they entered into, the plaintiffs are estopped from effectively raising the "fixtures" argument. Such a contention could properly be made only by parties not privy to the equipment lease agreement. Although plant and machinery can become fixtures, the owner of land can contractually provide for the plant and machinery to be regarded not as fixtures. The terms of such a contract are of course binding only on those who are privy to the contract and perhaps in equity also on those who have notice of the contract.

[5] In the instant case the lands involved are either alienated land or State land with a temporary occupation licence (TOL). That the land is agricultural is not relevant. What is relevant *vis-a-vis* illegality in the context is whether the plaintiffs had the requisite permits to extract and remove rock material.

[6] The plaintiffs in the instant case had represented to the first defendant that all the necessary permits had been obtained to install the machinery and equipment on the land. If the plaintiffs have a permit to extract and remove rock materials from the land, the permit surely will include the erection or installation of the necessary plant and equipment on the land from which the extraction and removal of the rock material has been permitted.

[7] The fact that one of the parties to a contract had bargained for certain terms but executed the final agreement in which all those terms are not reflected does not *per se* make for the terms of his bargain not included in the executed agreement to be a condition precedent to the latter final agreement.

[Plaintiffs' application dismissed with costs.]

Cases referred to:
Chow Yoong Hong v. Choong Fah Rubber Manufactory [1962] AC 209 ***(foll)***
Gebrueder Buehler AG v. Peter Chi Man Kwong & 2 Ors. [1988] 2 MLJ 69 ***(foll)***
Hobson v. Gorringe [1897] 1 Ch 182 ***(foll)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92
Finance Companies Act 1969, ss. 2, 4
National Land Code 1965, s. 45

Other Sources referred to:
Halsbury's Laws of England, Vol. 9, paras. 201 & 203
Tenure & Land Dealings, David Wong pp. 104 & 105

For the plaintiff - G. Krishnan; M/s. Krishnan & Co.
For the defendant - K. Ananthan; M/s. Skrime & Co.

JUDGMENT

VC George J:

On or about 20 January 1985 the plaintiffs entered into a written agreement with MLB Holding Sdn. Bhd., by which the plaintiffs purchased a quarry plant and related equipment to be installed at the plaintiffs' lands at or about Batu 10 1/2 Jalan Cheras, in the Mukim of Ulu Langat, Selangor. The agreed cost of the plant and equipment was RM2,495,500 for which price the vendors were to install the plant and equipment and which amount was to be paid progressively as the plant and equipment was being installed. The plaintiffs were also to enter into an agreement to purchase a weighbridge which was also to be installed as part of the quarry, negotiations in respect of which has been held *inter alia* with Messrs. Roger Tan Alat-Alat Timbang Sdn. Bhd.

As the installation of the plant and equipment was being effected the plaintiffs approached the 1st defendant, a Finance Company, for what appears to have been financial assistance to complete the purchases and proposed purchases in response to which by its letter of 5 March 1985 the 1st defendant approved a "leasing facility" in favour of the plaintiffs in the terms set out in the said letter which terms were on the application of the plaintiffs amended

in the terms set out in the 1st defendant's letter of 30 March 1985 to the plaintiffs. In the meantime RM978,425 being in part payment of the agreed purchase price had been paid by the plaintiffs to MLB Holding Sdn. Bhd.

Shortly stated, what the 1st defendant finance company was prepared to do was to step into the shoes of the plaintiffs as purchasers of the plant and equipment by means of a novation agreement, fully pay off the vendors (less the amounts that had been paid by the plaintiffs which amounts were to be refunded to the plaintiffs) and lease the plant and equipment (as well as the weighbridge that the 1st defendant would purchase) to the plaintiffs. Payments agreed to be made by the lease agreement was to be secured by debentures to be issued by the plaintiffs in favour of the 1st defendants, a charge of certain lands and by certain letters of guarantee.

These terms must have been acceptable to the plaintiffs since relevant board resolutions were duly effected by the plaintiffs followed by the plaintiffs on 7 June 1985 entering into a lease agreement in respect of the plant and equipment as well as the weighbridge (chosen by the plaintiffs and bought by the 1st defendants) prior to which in respect of the plant and equipment a novation agreement was entered into by the relevant parties and in respect of which the full purchase price (less the said payments that had been made by the plaintiffs) was paid by the 1st defendants to the vendors. In respect of the weighbridge the 1st defendant had paid off the vendor the full purchase price of RM98,000 (no advances had been made therefor by the plaintiffs). Of the RM978,425 that had been paid by the plaintiffs to MLB Holding Sdn. Bhd., RM697,191 was refunded to the plaintiffs and the balance of RM281,234 was credited to the plaintiffs' account with the 1st defendant as being advance rentals and certain prepaid rentals and certain miscellaneous charges (of RM200) in respect of the "leasing facility". The agreed debentures were also provided as were a charge by Zerah Corp. Sdn. Bhd., of its lands in Ulu Kinta, Perak and another by one Latifah binti Haji Ramdzan of her lands in Kajang, Selangor and letters of guarantee by Hamzah bin Abdul Majid and Haroun Al-Rashid (who at all relevant times were shareholders and directors of the plaintiff company) as well as by companies called Sri Kajang Sdn. Bhd., Sri Minang Sdn. Bhd. and the said Zerah Corp. Sdn. Bhd.

By this originating summons the plaintiffs seek a declaration that the lease agreement "is null and void and of no effect as a lease agreement and therefore no payment is due thereon", for orders that each of the said debentures and charges and guarantees are "invalid and unenforceable, null and void and of no effect" and for certain other consequential orders on the following grounds:

(1) that in reality the transaction between the plaintiffs and the 1st defendant was a loan transaction - a lending of money by the 1st defendant to the plaintiffs to be repaid with interest and that accordingly the lease was a sham and as such null and void and of no effect.

(2) that even if the transaction is a lease it is illegal in that the 1st defendant is a finance company within the meaning of the Finance Companies Act 1969 s. 4 of which prohibits the 1st defendant from carrying on any business other than finance business.

(3) that the plant and equipment were so fixed to the land that they had become fixtures on the land. The owners of the land being the plaintiffs; in effect the plaintiffs became owners of the plant and equipment that had been so affixed to the land and that the plaintiffs could not be lessees of what belonged to them.

and

(4) that the loan given to the plaintiffs was for the purpose of having installed on the said land a quarry to extract and break up rock material which purpose was an illegal purpose as the land on which the quarry was installed was agricultural land.

To constitute a valid contract there must be separate and definite parties thereto; those parties must be in agreement, that is there must be a *consensus ad idem*; those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises and the promises of each party must be supported by consideration.

In the instant case the discussions and negotiations oral and written, between the parties, led to the parties entering into a formal written agreement which has all the above ingredients and which is the lease agreement of 7 June 1985, the validity of which is sought to be impugned by this originating summons.

I pause to note that it has been contended on behalf of the plaintiffs that there was in fact a separate oral agreement between the parties (which it is contended has to be read with the lease agreement) to the effect that the 1st defendant were to buy the plant and equipment for the plaintiffs and that once the plaintiffs have paid the 1st defendants "all the money" which Counsel for the plaintiffs said constituted the purchase price together with interest thereon, the equipment would belong to the plaintiffs. The terms of this alleged oral agreement are clearly inconsistent with the terms of the lease agreement. It was contended that if there had not been such an oral agreement the plaintiffs would not have entered into the lease agreement and it is contended that therefore such an oral agreement was a condition precedent and as such even though its terms are inconsistent with the lease agreement they have to be admitted.

That argument is based on a misconception as to conditions precedent. That one of the parties to a contract had bargained for certain terms but executed the final agreement in which all those terms are not reflected does not *per se* make for the terms of his bargain not included in the executed agreement to be a condition precedent to the latter final agreement. By s. 91 of the Evidence Act (in the context) when the terms of a contract have been reduced to the form of a document no evidence shall be given in proof of the terms of the contract between the parties except the document itself. Section 92 of the Evidence Act excludes evidence of any oral agreement contradicting, varying, adding to or subtracting from the terms of the document the terms of which have been proved by s. 91. There are exceptions to the rule which are provided in s. 92 as provisos to the rule, one of which, no doubt, is an oral agreement constituting a condition precedent.

Now, there is said to be a condition precedent in respect of a contract where it is one of the terms of the contract that the liability of the party shall only arise on the happening of some future event which may or may not happen or on one of the parties doing some act. An example of such a condition precedent is the opening of a letter of credit by the buyer as a condition precedent to a contract for sale of goods. In fact good examples of conditions precedent can be seen in the transactions the subject of the instant case. I refer to the novation agreement in respect of the purchase of the plant and equipment the entering into which is a condition precedent to the lease agreement being entered into and of the other conditions precedent expressly set out as such in Part A to the Schedule to the lease agreement. I pause to note that the alleged oral agreement is not included in Part A to the Schedule which is not surprising because without any doubt, the alleged oral agreement does

not fall within or anywhere near what is understood to be a condition precedent. And since the alleged oral agreement amounts to terms that contradict the terms of the lease agreement and as such runs foul of the s. 92 of the Evidence Act rule it may not be admitted.

Now I have no doubt that what happened in this case is that the deponents of the affidavits, encl. (2) and (8), who are the said shareholders and directors of the plaintiff company needed to raise cash for the company to complete the purchase and installation of the quarry plant and equipment and as well as the related weighbridge. I am prepared to accept that which is said on behalf of the plaintiffs that they had approached the 1st defendants to raise the necessary cash. The 1st defendant company was prepared to accommodate them. What the 1st defendant company was prepared to offer to the plaintiffs has been looked at earlier and is as seen in their said letters of offer dated 5 March and 30 March 1985. What is offered in those letters is referred to as a "leasing facility", the full terms and conditions of which are set out therein.

At all relevant times the 1st plaintiff was and is a licensed finance company within the meaning of the Finance Companies Act 1969. By s. 4 of the Act such a finance company is precluded from carrying of any kind of business other than finance business which is defined in s. 2 *viz.*

> finance business means:
>
> (a) the acceptance of any money on deposit or loan by a person (in this definition referred to as "the borrower") from more than ten persons wherein the borrower is under a liability (whether or not such liability is present or future) to repay the money to these persons; and
>
> (b) (i) the lending; or
>
> (ii) the investment,
>
> by the borrower, his agents or his servants (and if the borrower is a company, including its wholly-owned subsidiaries) of the borrower's funds.

It was submitted that because of the s. 4 prohibition the first defendant could not, for example, carry on fish mongering or grocery business with which submission there can be no quarrel. (Section 4 provides a classic example of a restriction imposed by statute on the freedom of contract which will be discussed later in this judgment - the section makes an inroad into that basic right). It was submitted that similarly the 1st defendants are precluded from doing leasing as a business. The question posed for resolution then is whether the 1st defendants entering into the lease agreement with the plaintiffs was in furtherance of carrying on the business of equipment leasing.

The plaintiffs rely only on the transaction itself (between the plaintiffs and the 1st defendants) in support of their contention that it was entered in furtherance of the 1st defendants carrying on the business of equipment leasing. Now it is not contended or even suggested that the plaintiffs went to the 1st defendants looking for the equipment that they wanted to lease. As has been seen it is clear that what had happened (and the plaintiffs do not say otherwise) was that the plaintiffs had already purchased or negotiated the purchase of the plant and equipment they needed from vendors therefor, namely MLB Holding Sdn. Bhd. and Roger Tan Alat-Alat Timbang Sdn. Bhd. They needed the cash to complete the purchase. They sought to raise the cash from the 1st defendants.

In *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1962] AC 209 at 216 the Privy Council in its advice said:

> There are many ways of raising cash besides borrowing. One is by selling book-debts and another by selling unmatured bills, in each case for less than their face value. Another might be to buy goods on credit or against a post-dated cheque and immediately sell them in the market for cash. Their Lordships are, of course, aware, as was Branson J, that transactions of this sort can easily be used as a cloak for money-lending. The task of the Court in such cases is clear. It must first look at the nature of the transaction which the parties have agreed. If in form it is not a loan, it is not to the point to say that its object was to raise money for one of them or that the parties could have produced the same result more conveniently by borrowing and lending money. But if the Court comes to the conclusion that the form of the transaction is only a sham and that what the parties really agreed upon was a loan which they disguised, for example, as a discounting operation, then the Court will call it by its real name and act accordingly.

In my judgment on the facts of the instant case, the plaintiffs (admittedly) sought to raise cash from the 1st defendant to complete the purchase of the equipment and what the 1st defendants agreed to do was to, in effect, provide the cash which they did by means of what they have referred to as a "leasing facility".

The plaintiffs say that in effect the transaction is money-lending transaction and applying the test provided by the *Chow Yoong Hong* case the Court could indeed conclude that in effect it could tantamount to be a moneylending transaction. It would be wrong to look at individual aspects of the transaction. For instance, it would be wrong to just look at the 1st defendants entering into the novation agreement or at the agreement to buy the weighbridge and hold that the 1st defendants were in the business of buying quarry equipment or buying weighbridges. And looking at the transaction as a whole, including the related debentures, charges and guarantees, I hold that the transaction and the said related securities were in furtherance of accommodating the plaintiffs' need to raise funds to effectively have the use of the plant and equipment.

Now, the "sham" cases relied on for and on behalf of the defendants are not relevant here and have, I think, misled the defendants. Some of the cases that come to mind are those of unlicensed money lenders disguising their moneylending transaction to try and avoid the provisions of the law pertaining to moneylending by unlicensed moneylenders. There are similarly sham transactions to avoid the provisions of the Hire Purchase Act or designed to hide running foul of public policy. However the Court will not call into question a transaction simply because it is not what it is made to appear to be. It is the attempt to avoid the provisions of the law or public policy that calls for the Court penetrating the disguise or cosmetic camouflage to call the transaction by its real name and to act accordingly.

In the instant case there has been no suggestion made and there is in any event nothing in the facts of the case to show that the intent of disguising for loan transaction as a leasing agreement was to avoid the provisions of some law or some aspect of public policy. And in any event if in effect the transaction was a moneylending transaction as is submitted by the plaintiffs themselves, then the complaint by them in respect of that is misconceived since one of the businesses that a finance company is allowed to undertake is moneylending and it must be remembered that as a finance company under the Finance Companies Act the 1st defendants are exempted from being affected by the provisions of the Moneylenders Ordinance.

The obvious reason for the 1st defendants requiring the plaintiffs to enter into an equipment leasing agreement was to have some further security in respect of the money provided by them over and above the charges and guarantees that they required the plaintiffs to provide.

Obviously they wanted the property in the equipment as further security, as it were, for the provision of the facility. And the documentation shows that the plaintiff and its shareholders and directors went along with what the 1st defendants required.

It is here relevant to look at the jurisprudence relevant to contracts which is summarised succintly in *Halsbury* Vol. 9 paras. 201 to 203. The primary justifications for the enforcement of a contractual promise against a promisor are economic (the economic necessity of compelling the observance of bargains) and moral (the moral justification that the promise was freely given). In the 19th century these two ideas led the common law to the extreme view that there should be almost complete freedom and sanctity of contract. However, this extreme view was not adopted by equity. Inroads were made into the extreme view not only by equity but by the common law itself and by statutory provisions. The learned authors of Halsbury in dealing with the subject submit that inspite of the said inroads, it remains generally true that the law of contract taken as a whole does not lay down rights and duties but rather imposes a number of restrictions subject to which the parties may create by their contract such rights and duties as they wish.

The plaintiffs (and the 1st defendants) had exercised the freedom of contract and this Court is obliged to recognise the sanctity of the exercise of the right there not being any valid reason for the Court to intervene. The plaintiffs in any event are estopped from now saying that the rights of the parties should be decided not according to the terms of the formal agreement they had entered into with the 1st defendants. I might, for further clarity of the principle, say that even if the purchase had been completed by the plaintiffs there would have been nothing wrong or improper for the 1st defendants to buy the plant and equipment from the plaintiffs and then lease them back to the plaintiffs provided that the transaction was a device utilised in furtherance of effectively lending money to the plaintiffs. The first two grounds fail.

As to the plant and equipment having become fixtures, the plaintiffs are in the face of the agreement they entered into estopped from effectively making such a contention. Such a contention could properly be made only by parties not privy to the equipment lease agreement. For example, a purchaser of the land on which the quarry was installed or erected without notice of the equipment lease agreement could relevantly raise the contention that the plant and equipment is part of the land. So could a chargee who forecloses on the charge as was the case in *Gebrueder Buehler A G v. Peter Chi Man Kwong & 2 Ors.* [1988] 2 MLJ 69 which was cited. In the judgment of that case reference was made to the English cases *Hobson v. Gorringe, Gough v. Wood* and *Reynolds v. Ashby* and in considering the effect of those cases an extract from the judgment of Fletcher-Moulton LJ in *Ellis v. Glover and Hobson Ltd.* was referred to (at p. 74 of *Gebrueder Buehler A G*):

> these cases decide that in general a mortgagor in possession has the right to permit trade fixtures to be fixed and unfixed on the premises, provided that they are unfixed before the mortgagee takes possession, but that the right to unfix them ceases when possession is taken by the mortgagee ... it is undoubted law that the mortgagor would have been entitled to fix and unfix trade fixtures, provided only that they were unfixed by him before he had been turned out of possession. This no doubt accounts for the importance attached in the later cases to the mortgagee having taken possession while the fixtures were still on the premises.

At p. 73 was the following quotation from A.L. Smith LJ's judgment in *Hobson v. Gorringe* [1897] 1 Ch. 182:

> It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture - that is part of the soil - when it was annexed to the soil by screws and bolts,

> subject as between Hobson (the owner) and King (the hirer) to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the stipulated monthly instalments. In our opinion, the engine became a fixture - that is part of the soil - subject to this right of Hobson which was given him by contract. But this right was not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gorringe (the mortgagee) is such a purchaser. The plaintiff's right to remove the chattel if not paid for cannot be enforced against the defendant, who is not bound either at law or in equity by King's contract.

One principle to be gleaned from these English cases is that although plant and machinery may become fixtures, the owner of the land can contractually provide for the plant and machinery to be regarded not as fixtures. The terms of such a contract are of course only binding on those privy to the contract and perhaps in equity also on those who have notice of the contract. Clearly it is not open to the plaintiffs in the instant case who were party to the lease agreement to effectively raise the "fixtures" argument. The 3rd ground also fails.

As to the 4th ground relied on by the plaintiffs that is the avoidance of the contract because of alleged illegality based on the quarry being on agricultural land, Judith Sihombing points out at p. 658 in her book on the National Land code in her commentary on s. 45 of the Code:

> The proprietor of alienated land, the lessee of reserved land and a licensee under a temporary occupation licence may not remove rock material nor forest produce from the land; neither may these parties or bodies extract metal or minerals from the land at all unless
>
> a. the person or body has a mining lease granted under the provisions of the Mining Enactment, Cap. 147: or
>
> b. the person or body has a permit or licence to remove rock materials granted by the State Authority under the provisions of the appropriate Land Rules.

Section 70 of the Act is as follows:

> 70. The State Authority may, in accordance with the provisions of this Chapter and of any rules under s. 14, permit the extraction and removal of any rock material (otherwise than for the purpose of obtaining metal or mineral therefrom) from:
>
> (a) State land;
>
> (b) alienated land;
>
> (c) mining land;
>
> (d) reserved land.

David Wong in his *Tenure and Land Dealings* at p. 104 points out:

> It has been noted that a grant in perpetuity or a lease of land by the State does not include the right to remove rock material beyond the boundaries of the land. The same applies to mining leases except that a mining lessee may so remove any rock material for the extraction therefrom of any metal or mineral ore. For any person to acquire a right to remove rock material, he must apply for a permit from the State for the purpose. The Code contains a set of provisions which deal with the matter.
>
> By s. 70, the State is empowered to "permit the extraction and removal of any rock material (otherwise than for the purpose of obtaining metal or mineral ore)" from (a) State land, (b) alienated land, (c) mining land or (d) reserved land.

and at p. 105:

> The Code also provides for the issue of a special kind of temporary occupation licence which is one combined with a permit for the extraction and removal of rock material. It seems clear that where a permit alone is issued, its holder is entitled by implication to enter the land and to carry out thereon such activities as are reasonably necessary for exercising his right of extracting and removing the rock material.

In the instant case the lands involved are either alienated land or State land with a temporary occupation licence (TOL). That the land is agricultural is not relevant. What is relevant *vis-a-vis* illegality in context is whether the plaintiffs had the requisite permit to extract and remove rock material. The plaintiffs had represented to the 1st defendants that all necessary permits had been obtained and in any event Article. 7(c) provides for the plaintiffs to ensure that the plant and equipment is not to be used "for any illegal purpose or under any circumstance which would amount to a breach of any statute, Ordinance, Rule, by-law or regulation or other law ..."

The plaintiffs do not rely on any lack of permit (from which it has to be assumed that the requisite permits had been obtained) but on the fact that the land is agricultural which, as has been shown, is misconceived.

If the plaintiffs have a permit to extract and remove rock materials then it follows, as David Wong points out, that the plaintiffs will be entitled to carry out such activities as are reasonably necessary to effect such extraction and removal which surely will include the erection or installation of the necessary plant and equipment on the land from which the extraction and removal of the rock material has been permitted.

In my judgment there is no merit in the 4th ground.

Accordingly the plaintiffs having failed on each of the grounds relied on, the application has to be and is dismissed with costs.

Also found at [1992] 1 CLJ 204